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van Sliedregt, E.

published in

Leiden Journal of International law
2007

DOI (link to publisher)

[10.1017/s0922156507004517](https://doi.org/10.1017/s0922156507004517)

document version

Publisher's PDF, also known as Version of record

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citation for published version (APA)

van Sliedregt, E. (2007). International Crimes before Dutch Courts: Recent Development. *Leiden Journal of International law*, 2007(4), 895-908. <https://doi.org/10.1017/s0922156507004517>

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International Crimes before Dutch Courts: Recent Developments

ELIES VAN SLIEDREGT*

Abstract

In the early 1990s, two former members of the Afghan secret service applied for a residence permit in the Netherlands. Their request was denied on the basis of the exclusion clause of Article 1F(a) of the Vienna Convention Relating to the Status of Refugees. There were serious reasons for suspecting that the men had committed war crimes during the Afghan civil war of 1979–92. In 2000, the immigration authorities transmitted the files of the two men to the public prosecution office, which initiated prosecutions in 2003. At the trial, defence counsel raised various preliminary challenges. They argued that the case should be declared inadmissible since relying on the immigration files would violate the *nemo tenetur* principle and the right against self-incrimination enshrined in Article 6 of the European Convention on Human Rights. Furthermore, the court had no universal jurisdiction over violations of Common Article 3 of the Geneva Conventions since there was no international rule mandating a right to universal jurisdiction over war crimes committed in non-international armed conflicts. The Hague District Court dismissed the defence challenges and eventually convicted the Afghan nationals to 9 and 12 years' imprisonment. The Hague Appeal Court endorsed most of the findings of the District Court and confirmed the convictions and sentences. The reasoning underlying the decisions, both at first instance and at appeal, raise questions particularly with regard to universal jurisdiction. In this article the defence arguments are explored and the reasoning of the courts is analysed.

Key words

Afghan cases; *aut dedere aut judicare*; Common Article 3; Dutch courts; grave breaches; mandated universal jurisdiction; *nemo tenetur*; self-incrimination; universal jurisdiction

I. INTRODUCTION

On 7 July 2000 Professor John Dugard issued his opinion in the *Bouterse* case before the Court of Appeal in Amsterdam. Lieutenant-Colonel Desi Bouterse was head of the Suriname army in December 1982, when 15 political opponents of the military regime were tortured and killed; 14 of them were of Suriname nationality and one was of Dutch nationality. Bouterse was thought to have played a major role in the torture and deaths of the victims, but no prosecutions had been undertaken by the Suriname authorities. On 20 November 2000, upon complaint filed by family members of two of the victims, the Court of Appeal in Amsterdam ordered the Dutch public prosecutor to initiate proceedings against Bouterse.¹ The Court had

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1. *Wijngaarde et al. v. Bouterse*, Court of Appeal, Amsterdam, 20 November 2000, IJN: AA8395, available at <http://ijn.rechtspraak.nl>. For an English translation see (2000) 3 *Yearbook of International Humanitarian Law*

sought the advice of John Dugard. One of the questions put before him was whether customary international law as it stood in 1982 provide a basis for Dutch courts to exercise extraterritorial jurisdiction.

The Court could not have appointed a better expert to advise them on matters concerning international law. As one of the judges on the appellate bench said, John Dugard is of 'undisputed authority' and 'a scholar of authority'.² The Court embraced his conclusions and ruled that torture was a crime against humanity and that universal jurisdiction could be exercised over Bouterse, a non-national. On 18 September 2001, the Dutch Supreme Court reversed the decision of the Court of Appeal, *inter alia* on the point of the exercise of universal jurisdiction *in absentia* and for the application of the 1987 Torture Act to facts that had occurred before its adoption in 1988.³ This was thought to be a violation of the legality principle enshrined in Article 16 of the Dutch Constitution. The Supreme Court did not decide any points of international law.

The *Bouterse* case triggered discussion in the Netherlands on the relationship between national criminal law and international law and on the content and scope of universal jurisdiction.⁴ The case was subject to debate in international legal circles as well;⁵ John Dugard's legal opinion played an important role in that debate. It is for this reason that in this special issue, honouring John Dugard, I should like to discuss recent developments in prosecuting international crimes before Dutch courts, more particularly the exercise of universal jurisdiction by Dutch courts.

In the following sections recent convictions by Dutch courts for war crimes and torture will be discussed (section 2). The focus will be on two preliminary challenges that were put forward by the defence. One relates to the way in which the case came before the court, via immigration procedures, and the effect that has on the *nemo tenetur* principle, including the right against self-incrimination (section 3). The second – and most important – issue concerns universal jurisdiction exercised by Dutch courts. The article addresses the defence challenge that a right to universal jurisdiction exists only when there is an international rule specifically authorizing or mandating such a right (section 4).

677. For a commentary see P. J. C. Schimmelpenninck van der Oije, 'A Surinam Case before a Dutch Court: Post-colonial Injustice or Universal Jurisdiction?', (2001) 14 LJIL 455. Case note by E. van Sliedregt and N. Keijzer, (2000) 3 *Yearbook of International Humanitarian Law* 548.

2. J. H. M. Willems, 'Treatment of Customary International Law and Use of Expert Evidence by the Dutch Court in the Bouterse Case', (2004) 4 *Non-state Actors and International Law* 64, at 73.

3. Dutch Supreme Court, 18 September 2001, LJN AB1471, available at <http://ljn.rechtspraak.nl>. For an English translation see (2001) 4 *Yearbook of International Humanitarian Law* 710; and case note by N. Keijzer in (2001) 4 *Yearbook of International Humanitarian Law* 595.

4. See W. N. Ferdinandusse, J. K. Kleffner, and P. A. Nolkaemper, 'Origineel of reproductie? Internationale strafbaarstellingen in de Nederlandse rechtsorde', (2002) *Nederlands Juristenblad* 341; G. A. M. Strijards, 'Neerlands dualisme en zijn strafmacht', (2000) *Nederlands Juristenblad* 2113.

5. See for instance the opinions of some of the ICJ judges in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, [2002] ICJ Rep. 3 (*Arrest Warrant Case*), in particular at 172 (Judge van den Wyngaert, Dissenting Opinion), at 70 (Judges Higgins, Kooijmans, and Buergenthal, Joint Separate Opinion), and at 42 (Judge Guillaume, Separate Opinion); see also L. Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003), 173.

2. THE CASES AGAINST TWO AFGHAN GENERALS

On 14 October 2005, The Hague District Court rendered (separate but related) judgments convicting two Afghan nationals, former members of the Afghan military intelligence service (Khad), for torturing civilians in the period 1985–90, during the Afghan civil war of 1978–92.⁶ H, the former head of the Khad, filed an application for asylum upon arrival in the Netherlands in 1992. J, former head of the interrogations department of the Khad, filed an application in 1996. H's request was denied, while refugee status was granted to J but withdrawn later. The immigration authorities determined that with regard to both men there were serious reasons for considering that they had committed war crimes, or crimes against humanity. This ground of refusal, also known as the 'exclusion clause' of Article 1F(a) of the Vienna Convention Relating to the Status of Refugees, was relied upon to deny the men a residence permit and a right to reside in the Netherlands. During questioning by immigration authorities the two men had provided what later turned out to be incriminating evidence. In 2000, the immigration authorities transmitted the immigration files to the public prosecution office, which initiated prosecutions against the two Afghan nationals in 2003.

The most interesting legal issues arose in the context of preliminary challenges raised by the defence; two of which will be discussed in more detail below. Defence counsel argued that the cases were inadmissible because the *nemo tenetur* principle – the principle whereby no one can be forced to contribute to his or her own conviction or criminal responsibility, which includes the right against self-incrimination – was violated. With that Article 6 of the European Convention on Human Rights (ECHR) was violated. The defence further disputed the exercise of universal jurisdiction over violations of Common Article 3 of the Geneva Conventions, since there was no international rule obliging, or at least mandating, the exercise of such jurisdiction. The District Court rejected the preliminary challenges and convicted and sentenced the two generals to 12 and nine years' imprisonment respectively.

On 29 January 2007, The Hague Court of Appeal delivered its judgment in both cases.⁷ The Court endorsed most of the District Court's findings and confirmed the guilty verdicts and sentences.

3. *NEMO TENETUR* AND ARTICLE 1F PROCEEDINGS

The District Court dismissed the defence challenge that there had been a violation of the *nemo tenetur* principle and the right against self-incrimination. The Court held that since the statements had not been obtained with a view to determining a criminal charge the *nemo tenetur* principle was not violated. The interview had had

6. The Hague District Court, 14 October 2005, LJN AU4373; The Hague District Court, 14 October 2005, LJN: AU4347, both are available at <http://ljn.rechtspraak.nl>.

7. The Hague Court of Appeal, 29 January 2007, LJN: AZ7147; The Hague Court of Appeal, 29 January 2007, LJN: AZ7143, available at <http://ljn.rechtspraak.nl>. One of the cases is available on the 'international law in domestic courts' database at <http://ildc.oxfordlawreports.com> as *H v. Public Prosecutor*, Court of Appeal of The Hague, ILDC 636 (NL 2007).

no other purpose than to establish whether a residence permit should be issued. Moreover, the Court found that when the accused applied for a residence permit and answered questions put to him by immigration authorities, there was no 'criminal charge' as under Article 6 ECHR.

The reasoning of the Court is not persuasive. Is it really relevant that at the time of the interviews there was no criminal charge? In the case of *Saunders* the European Court of Human Rights (ECtHR) held that the protection of the right against self-incrimination also covers the period before there is a 'criminal charge'.⁸ It is further noteworthy that the District Court deemed it relevant that the immigration staff did not foresee that the answers to their questions would be used in a criminal trial. Should we take from this that sincere or correct information gathering in the pre-trial phase guarantees compliance with the *nemo tenetur* principle? Again, *Saunders* seems to point to a different conclusion: correct or sincere information gathering in the non-criminal pre-trial phase may still lead to a violation of the right against self-incrimination in a subsequent criminal proceeding.

Mettraux, in a commentary to the judgments, criticizes the District Court's decisions on this point.⁹ He argues that the essence of the right against self-incrimination, and the *nemo tenetur* principle, is the perception of the accused, not 'the perception which the immigration official might have had at the time about the (im-)possibility of criminal proceedings arising out of those files'.¹⁰ His criticism is legitimate with regard to the Court's reliance on *Saunders*, but it does not hold as a general statement. In another ECtHR case, the case of *Weh*, an official's attitude and intention was indeed considered relevant in deciding whether there was a violation of the *nemo tenetur* principle. The European Court held that the complainant's right not to incriminate himself was not violated since there was no concrete threat of criminal prosecution when he provided information to the authorities.¹¹ The threat of criminal prosecution, which may be used to put pressure on a person who is being questioned, was thought to amount to pressure that could violate *nemo tenetur*. With a view to *Weh* the attitude of the immigration officer may indeed be important in determining whether improper pressure has been applied. The closer the link between asylum proceedings and a criminal prosecution, the greater the pressure on the accused, and the greater the likelihood that the *nemo tenetur* principle is violated. Since the defence in these cases did not substantiate in any way that at the time of the interviews there was an indication that criminal investigations would be initiated against their clients, and because of the fact that four to eight years had passed between the time of the interview and the transfer of the files, it is submitted that the defence arguments were rightly dismissed by the District Court. The Appeals Court endorsed the District Court ruling. It held that since there was no

8. *Saunders v. United Kingdom*, Decision of 17 December 1996, ECHR Reports 1997-III, 691.

9. G. Mettraux, 'Dutch Courts' Universal Jurisdiction over Violations of Common Article 3 qua War Crimes', (2006) *Journal of International Criminal Justice* 362.

10. *Ibid.*, at 365.

11. *Weh v. Austria*, Decision of 8 April 2004, ECHR appl. no. 38544/97 (not yet published). Weh was asked to disclose the name of the person driving the car that was registered in his name. A refusal to disclose such information was met with the threat of an administrative fine.

link between immigration and criminal proceedings no relevant pressure had been applied.¹²

Nowadays the immigration authorities and the prosecution services co-operate closely. While both services already in 1997 expressed the intention to intensify their co-operation in pursuing a strict '1F policy', it was not until 2002 that this really commenced. Plans have been made to increase the criminal-law expertise of immigration officials, to ensure that police are present at immigration interviews, and to post a criminal lawyer permanently at the immigration services.¹³ It seems that in recent years the immigration- and criminal-law spheres have been brought closer together. Some have expressed the fear that the 1F procedure will develop into a pre-trial quasi criminal procedure.¹⁴ This close co-operation would deprive of all force the arguments put forward by the District Court and the Court of Appeal on the point of *nemo tenetur*, at least for more recent prosecutions that stem from 1F proceedings.

Both the District Court and the Court of Appeal unequivocally dismissed the defence argument that the statements of the accused before immigration officials have been made under pressure because they were forced to leave their country and seek residence elsewhere. The District Court held that no one is forced to apply for a residence permit in the Netherlands and that both accused voluntarily subjected themselves to the procedure of interviews. It is submitted that the Courts were right in dismissing the defence argument, not because there was a complete lack of pressure but because the pressure to respond to questions stemmed from the necessity to escape from Afghanistan rather than the attitude of the Dutch authorities. This is pressure that does not affect the right not to incriminate oneself, as protected by the *nemo tenetur* principle and Article 6 ECHR.¹⁵ The fact that a person seeking access to the Netherlands may feel forced to co-operate with the authorities to achieve this goal does not mean that he or she is under the type of pressure that is relevant in determining whether *nemo tenetur* has been violated.

4. UNIVERSAL JURISDICTION

4.1. The District Court judgment

The issue that has been discussed most vigorously, in and outside the court room,¹⁶ concerns the exercise of universal jurisdiction. In the case of H, the defence

12. See *H v. Public Prosecutor*, *supra* note 7, para. 6.2.6.

13. 'Evaluatie Plan van Aanpak opsporing en vervolging oorlogsmisdrijven (Evaluatie Plan van Aanpak)', Addendum to *Kamerstukken II* 2005/2006, 30300 VII, nr. 119, at 61. See 'Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet internationale misdrijven', *Staatscourant*, 22 December 2003, no. 247.

14. See the report by the Nederlands Juristen Comité voor de Mensenrechten (NJCM; the Dutch branch of the International Commission of Jurists), 'Commentaar betreffende de toepassing van artikel 1F Vluchtelingenverdrag en de bestrijding van terrorisme', 11 June 2002 and 'Evaluatie Plan van Aanpak', *supra* note 13, 58–59.

15. For a different view see Mettraux, *supra* note 9, at 365.

16. The District Court judgments started a polemic in the *Journal of International Criminal Justice* between Mettraux, Zegveld, and Ferdinandusse. See Mettraux, *supra* note 9, 362–71; L. Zegveld, 'Dutch Cases on Torture Committed in Afghanistan: The Relevance of the Distinction between Internal and International Armed Conflict', (2006) 4 *Journal of International Criminal Justice* 878; W. N. Ferdinandusse, 'On the Question of Dutch Courts' Universal Jurisdiction. A response to Mettraux', (2006) 4 *Journal of International Criminal Justice* 881;

challenged the District Court's jurisdiction by arguing that it lacked universal jurisdiction over violations of Common Article 3 of the Geneva Conventions. Common Article 3, which applies in situations of non-international armed conflict, does not provide for an *aut iudicare aut dedere* clause¹⁷ as does paragraph 2 common to Articles 49/50/129/146 of the 1949 Geneva Conventions (the so-called grave breaches provisions) that apply in international armed conflicts. The latter clause implies the establishment of universal jurisdiction.¹⁸ Reasoning *a contrario*, the defence argued that as a result Common Article 3 does not provide for universal jurisdiction. What underlies the defence argument is the understanding that exercising universal jurisdiction requires an *explicit* authorization or mandate under international law. Since (i) no such rule exists under international law with regard to violations of Common Article 3, and (ii) a national provision – such as Article 8, read together with Article 3, of the Dutch War Crimes Act criminalizing war crimes in general terms and providing for jurisdiction over such crimes – is not sufficient as a basis for universal jurisdiction, the case should be declared inadmissible.

The District Court dismissed the defence argument. It held that the fact that there exists an obligation to prosecute grave breaches does not preclude states from establishing universal jurisdiction over other violations of international humanitarian law. In other words, what is not obliged may still be permitted. In arriving at this conclusion the judges relied on paragraph 3 common to Articles 49/50/129/146 of the 1949 Geneva Conventions, which stipulates that states shall 'take measures necessary for the *suppression* of all acts contrary to the provisions of the present convention other than the grave breaches' (emphasis added). The judges held that such measures can be of a criminal nature.

This part of the ruling has been rightly criticized.¹⁹ The District Court failed to distinguish between a state's authority to criminalize certain conduct, on the one hand, and a state's right to adjudicate such conduct, on the other hand. Or, in the words of O'Keefe, between jurisdiction to prescribe and jurisdiction to enforce.²⁰ The District Court justified exercising universal jurisdiction over violations of Common Article 3 through the suppression clause of paragraph 3 of the grave breaches provisions. However, the fact that the Geneva Conventions authorize the suppression of violations of Common Article 3 does not *eo ipso* mean that a Dutch judge has universal jurisdiction over such violations.

G. Mettraux, 'Responses to the Comments by Zegveld and Ferdinandusse', (2006) 4 *Journal of International Criminal Justice* 884.

17. The more common way of referring to such an obligation is *aut dedere aut iudicare*, or 'extradite or adjudicate'. In the Geneva Conventions the order is reversed. Article 49(2) GCI reads: 'Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a "prima facie" case'.

18. See R. van Elst, 'Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions', (2000) 13 *IJIL* 819.

19. See Mettraux, *supra* note 9, at 367; Zegveld, *supra* note 16, at 879.

20. R. O'Keefe, 'Universal Jurisdiction. Clarifying the Basic Concept', (2004) 2 *Journal of International Criminal Justice* 735, at 736.

4.2. The Court of Appeal judgment

At appeal, the Court of Appeal addressed the question raised by the defence and left unanswered by the District Court: does the Dutch War Crimes Act provide a sufficient basis for exercising universal jurisdiction? In raising this question the defence repeated its claim that the exercise of universal jurisdiction by national courts requires a written or unwritten international rule mandating such exercise.

The Court answered the question in the affirmative: the Dutch War Crimes Act *does* constitute a sufficient basis for establishing universal jurisdiction. The Court put forward two reasons. The first reason was the purpose to end impunity. This had been one of the main reasons for the Dutch legislature to establish universal jurisdiction over torture in the act implementing the 1984 UN Convention against Torture.²¹ As the deliberations laid down in the Explanatory Memorandum to the 1987 Torture Act go to show, the legislature felt the need to prevent torturers from travelling freely to countries where they could confront their victims who had fled abroad. The Court held that the same goal might be served by exercising universal jurisdiction under the War Crimes Act. The second reason was found in the wording of Article 3, the *chapeau*, and under subsection 1 of the War Crimes Act, that unreservedly stipulates that there is jurisdiction over the war crimes listed in Articles 8 and 9 of the War Crimes Act.²²

This is only half the answer. So far the Court merely referred to *national* law in responding to the defence challenge on universal jurisdiction. It did not explain whether, and if so which, *international* rule(s) permit(s) the exercise of universal jurisdiction under Article 3 of the War Crimes Act. Nor did it address the defence argument that such authorization is required. Instead – and here the judgment takes a surprising turn – the Court dismissed the defence argument on constitutional grounds. The Court (re)interpreted the defence challenge as claiming that customary international law prohibits the exercise of universal jurisdiction over violations of Common Article 3 of the Geneva Conventions. Since Article 94 of the Dutch Constitution, read *a contrario*, stipulates that customary international law that *conflicts* with national statutory law is not applicable in the Dutch legal order,²³ the Court declared itself not competent to rule on the matter.²⁴ It found that it was not competent to determine whether Article 3 of the War Crimes Act is in conformity with international law. This is a somewhat unsatisfactory ruling. It seems that the Court steered itself into a ‘not competent position’ by translating the defence’s claim on the absence of an international law *mandate* into the presence of an international law *prohibition*, a rule of customary international law that prohibits the exercise of universal jurisdiction. This is a subtle difference, but one that leads straight to the constitutional limitation of Article 94. After all, had the Court found that there was

21. *H v. Public Prosecutor*, *supra* note 7, para. 5.2.3.

22. ‘Regardless the stipulations in the Penal Code and the Military Penal Code, the Dutch penal legislation applies: 1° to anyone who committed a crime outside the Kingdom in Europe as described in articles 8 and 9’. Translation by ILDC. See ILDC 636 (NL 2007), para. 5.2.3.

23. As interpreted in case law (the case of *Nyugat*), Dutch Supreme Court, 6 March 1959, (1962) *Nederlandse Jurisprudentie* 2.

24. See *H v. Public Prosecutor*, *supra* note 7, para. 5.4.1.

a customary rule permitting, or even specifically mandating, a right to assert and exercise universal jurisdiction, there would have been no obstacle to applying it in the Dutch legal order.

In concluding its decision, the Appeal Court referred to the *Knežević* judgment before the Dutch Supreme Court.²⁵ In *Knežević*, the Supreme Court held that a foreign asylum-seeker could be prosecuted in the Netherlands for war crimes committed during a non-international armed conflict (namely the conflict in the former Yugoslavia), even if it concerned a conflict in which the Netherlands was not involved as a party. The Supreme Court found that the Dutch legislature, when drafting the War Crimes Act, intended to comply fully with its obligations under the Geneva Conventions, admittedly first and foremost with regard to the grave breaches, yet it appears from parliamentary debate at the time that it did not exclude the possibility of exercising jurisdiction over crimes committed in non-international armed conflicts as well. The Court of Appeal adopted this reasoning in dismissing the defence challenge with regard to universal jurisdiction.

4.3. Mandated, permitted, or prohibited universal jurisdiction?

The question remains: is the exercise of universal jurisdiction by a Dutch court over violations of Common Article 3 of the Geneva Conventions permitted under *international* law? Is it true, as defence counsel maintained, that the exercise of universal jurisdiction requires a mandate under international law? These questions go to the heart of the debate and controversies surrounding the concept of universal jurisdiction. Much has been written about universal jurisdiction and many views exist as to its scope and meaning. This is not the place to discuss these views at length but the following observations can be made.

The defence claimed that a right to universal jurisdiction requires an international rule *specifically* mandating this. This position is different from the view that asserting extraterritorial jurisdiction is lawful as long as there is no international rule prohibiting it. The latter position is the rule emanating from the *Lotus* decision of 1927 by the Permanent Court of International Justice, a case in which France complained about Turkey's exercise of criminal jurisdiction over the French captain of a vessel that had collided with a Turkish ship on the high seas and had caused Turkish casualties.²⁶ The judges in *Lotus* held that 'Restrictions upon the independence of states cannot be presumed.' The court held that states have a right

25. Dutch Supreme Court, 11 November 1997, (1998) *Nederlandse Jurisprudentie* 463; for an English translation of the case see (1998) 1 *Yearbook of International Humanitarian Law* 601 with note by N. Keijzer. See further Reydam, *supra* note 5, at 171; R. van Elst, 'De zaak Darco Knezevic; rechtsmacht over Joegoslavische en andere buitenlandse oorlogsmisdadigers', (1998) *Nederlands Juristen Blad* 1587.

26. *SS Lotus case (France v. Turkey)*, [1927] PCIJ Rep Series A, No. 10, at 4. The Court held that 'The first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another state'. However, the Court continues, 'it does not . . . follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law', and, further on, 'far from laying down a general prohibition to the effect that states may not extend the application of their laws and jurisdiction of their courts to persons . . . outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules'. *Ibid.*, at 19.

to assert jurisdiction as long as it is not prohibited by an international convention or custom. This 'presumptive freedom of state action' – to use Reydam's words²⁷ – is controversial and has sparked debate amongst international and criminal lawyers. The *Lotus* test is regarded as too liberal, given the growing complexity of the present-day international legal order. This criticism can be countered, on the other hand, by arguing that the '*Lotus* freedom' is not unlimited. The decision itself refers to '[t]he limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty'.²⁸

The concept of universal jurisdiction appears in different shapes and forms and various (sub)categories have been distinguished in legal doctrine.²⁹ No agreed definition exists, and scholars tend to rely on a negative definition – defining universal jurisdiction by stipulating what it is not. It is jurisdiction over conduct that cannot be linked to a state's territory, the offender's or victim's nationality, or protection of certain state interests. In the words of O'Keefe it is 'prescriptive jurisdiction in the absence of any other recognized jurisdictional nexus'.³⁰

The various forms of universal jurisdiction represent the evolution of the concept over time, which is a development from a co-operative universal jurisdiction over *all* serious crimes to universal jurisdiction for a limited class of international crimes. The latter has been referred to as 'unilateral universal jurisdiction',³¹ 'pure universal jurisdiction',³² or 'true universal jurisdiction'.³³ This evolution explains why some scholars are sceptical about applying *Lotus* to present-day universal jurisdiction. Since Nuremberg, universal jurisdiction has evolved into a concept with a specific purpose: ending impunity and not letting international crimes go unpunished. The establishment of international criminal tribunals and the adoption of international conventions criminalizing heinous acts such as genocide and war crimes have made universal jurisdiction a distinctive feature of a category of international crimes. It is for this reason that the members of the seventeenth commission of the Institut de Droit International, in adopting a resolution on universal jurisdiction,³⁴ and scholars such as Kress³⁵ reject the validity of the *Lotus* decision as a basis for universal jurisdiction over international crimes. Nevertheless, there are also those who hold

27. Reydam's, *supra* note 5, at 13.

28. *Lotus* case, *supra* note 26, at 18–19.

29. Universal jurisdiction may be a form of legal co-operation and as such confined by requiring either a link with the forum state or a connection with extradition. This form has been referred to as 'co-operative universal jurisdiction' or jurisdiction stemming from the 'representation principle'. Universal jurisdiction may be a unilateral claim for jurisdiction on behalf of the international community and as such no longer requiring a link with the forum state. It may be 'limited universal jurisdiction' by only regarding international crimes. And it may be 'general universal jurisdiction' applying to all serious offences that are punishable in most legal systems. See Reydam's, *supra* note 5, at 28–43.

30. See O'Keefe, *supra* note 20, at 744. See also Reydam's, *supra* note 5, at 5: "universal jurisdiction" means that a State, without seeking to protect its security or credit, seeks to punish conduct irrespective of the place where it occurs, the nationality of the perpetrator, and the nationality of the victim'.

31. Reydam's, *supra* note 5, at 38–42.

32. Princeton Principles on Universal Jurisdiction, Commentary at 42, available at <http://www1.umn.edu/humanrts/institute/princeton.html>.

33. C. Kress, 'Universal Jurisdiction over International Crimes and the Institut de Droit International', (2006) 4 *Journal of International Criminal Justice* 561, at 572.

34. The resolution is available at http://www.idi-iil.org/idiE/navig_chon2003.html.

35. Kress, *supra* note 33, at 572.

that *Lotus* is still valid. In the *Arrest Warrant* case, Judges Higgins, Kooijmans, and Buerghenthal in their Joint and Separate Opinion,³⁶ and Judge Van den Wyngaert in her Dissenting Opinion,³⁷ rely on *Lotus* as a basis for a permissive international rule on universal jurisdiction.

This author agrees with the latter position; *Lotus* can be a basis for universal jurisdiction, first of all because the *Lotus* decision is still the only international decision regarding a state's right to exercise extraterritorial jurisdiction and, second, because state practice evidences the popularity of the *Lotus* decision. As Reydam's points out, the fact that states have been reluctant to adopt a global convention on criminal jurisdiction (where such instruments do exist with regard to jurisdiction in civil and commercial matters), that domestic jurisdictions have endorsed the *Lotus* decision in asserting universal jurisdiction over international crimes, and the fact that states generally refrain from referring jurisdictional issues to the ICJ can all be taken as evidence for the continuing popularity of the *Lotus* decision in the ambit of pure universal jurisdiction.³⁸

The *Lotus* decision cannot, however, be the *sole* basis for universal jurisdiction; it is a minimum requirement that requires support from (an) other permissive rule(s). Asserting universal jurisdiction over international crimes requires first of all linking it to international rules comprising universal values. As Kress submits, 'it is impossible for a state to unilaterally call into being a fundamental international community value that it can then protect through the existence of universal jurisdiction'.³⁹ While such values are often codified in conventional law, universal jurisdiction rarely is, hence the importance of customary international law.⁴⁰ Bearing in mind that universal jurisdiction does not exist by way of the criminalization of conduct at the international level,⁴¹ identification of a permissive rule in (customary) international law, or at least a positive predisposition in state practice, is still necessary. This is not the same as requiring a rule *specifically* mandating universal jurisdiction. That would go against the *Lotus* principle of presumptive freedom. And here we return to the cases of the two Afghan generals.

Accepting the validity of the *Lotus* decision implies, first of all, rejecting the defence claim of mandated universal jurisdiction. Moreover, as a requirement additional to *Lotus*, a rule must be identified permitting universal jurisdiction over violations of Common Article 3 – that is, war crimes committed in non-international armed

36. See *supra* note 5, para. 50.

37. *Ibid.*, para. 48.

38. Reydam's, *supra* note 5, at 14–17, 161–3 and 216–17, referring to H. Fox, 'Jurisdiction and Immunities', in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (1996), 210 at 212–15, the *Eichmann* case before the Supreme Court of Israel and the *Demanjuk* case before a US federal court.

39. Kress, *supra* note 33, at 572, referring to C. Maierhöfer, *Aut dedere – aut judicare. Herkunft, Rechtsgrundlagen und Inhalt des völkerrechtlichen Gebotes zur Strafverfolgung oder Auslieferung* (2006), at 41 ff.

40. The Genocide Convention provides for territorial jurisdiction, which is 'extended' to universal jurisdiction in a number of domestic statutes and court decisions, thus making the Convention's jurisdictional clause a 'minimum rule'. See the recent decision of the ECtHR, *Jorgic v. Germany*, 12 July 2007, appl. no. 74613/01. See also practice of Australia, Austria, Canada, Belgium, France, Israel, and Switzerland as discussed by Reydam's, *supra* note 5.

41. States may be in favour of denouncing certain conduct as international crimes yet deny the exercise of universal jurisdiction over it for the fear of politically motivated trials and prefer international adjudication. See Kress, *supra* note 33, at 572.

conflicts. It is this last question that has been left unanswered by the Court of Appeal for reasons set out above.

In answering this question, it should be emphasized that the fact that there is no provision in the Geneva Conventions obliging states to extradite or adjudicate (*aut dedere aut judicare*) violations of Common Article 3 does not in any way detract from the existence of a rule permitting universal jurisdiction over such violations. In other words, the lack of an *obligation* in *treaty* law to prosecute, implying universal jurisdiction,⁴² does not preclude (i) the existence of a *right* to assert universal jurisdiction under customary international law, or (ii) the existence of a *customary aut dedere aut judicare* rule with regard to crimes committed in non-international armed conflicts. Substantiating both assumptions as valid can be done only by relying on customary international law, which may essentially be deduced from 'verbal' state practice and the deduction of principles.⁴³

Indications for a customary permissive rule can, first of all, be found in national statutory law providing for universal jurisdiction over war crimes committed in non-international armed conflicts⁴⁴ and national decisions stemming from prosecutions for such crimes.⁴⁵ Second, the Statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) provide for jurisdiction over violations of Common Article 3 of the Geneva Conventions, in Articles 3 and 4 respectively. As these instruments stipulate that Tribunals have *concurrent* jurisdiction (Art. 8/9(1) ICTR/Y Statute) and states are under a duty to co-operate (Art. 28/28(1) ICTR/Y Statute) these provisions implicitly force states to establish universal jurisdiction over such crimes. A third indicator for a permissive rule can be found in the landmark ruling of the ICTY in *Tadić* that violations of Common Article 3 are crimes under international criminal law which entail individual criminal responsibility.⁴⁶ *Tadić* is not only relevant for adjudication at the international level; we are reminded here of the 'completion strategy' and the referral of cases by the ICTY and the ICTR to domestic courts and the practice of referral of cases by the ICTY and ICTR to domestic courts. Such courts are expected to have universal jurisdiction over violations of Common Article 3. Finally, the members of the 17th Commission of the Institut de Droit International agree in paragraph 3(a) of the Resolution that 'universal jurisdiction may be exercised over crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the

42. Van Elst, *supra* note 18, at 819–25.

43. See Kress, *supra* note 33, at 573–6, where he convincingly argues that the existence of a permissive international legal rule may be deduced from the categorization by states of conduct as an international crime. This 'verbal' state practice test suffices instead of the precise 'hard' state practice of the *Continental Shelf* case.

44. For instance the Belgian Law relating to the Punishment of Grave Breaches of International Humanitarian Law (Art. 7) or the Swiss Code Pénal Militaire (Art. 108(2)) and since 1998 legislation giving effect to obligations under the ICC Statute (Canada, New Zealand, United Kingdom). See further Reydam, *supra* note 5, at 81–220 and Maierhöfer, *supra* note 39, at 196–221.

45. See *infra* the Danish *Sarić* case before the Højesteret, 15 August 1995; the Belgian *Higaniro et al.* case before the Assize Court of Brussels, 8 June 2001; and the Swiss case of *Niyonteze* before the Tribunal militaire d'appel 1A Geneva, 26 May 2000. See further Reydam, *supra* note 5, at 81–220 and Maierhöfer, *supra* note 39, at 196–221.

46. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1, A.Ch., 2 October 1995, paras. 128–34.

protection of war victims *or other serious violations of international humanitarian law committed in international or non-international armed conflict* (emphasis added). This is far from an exhaustive list of 'indicators'. However, taken together, they do provide 'proof' of the existence of a permissive rule.

Is the above also proof for a permissive rule in the period 1985–90, the time of the crimes in the Afghan cases? In a recent study Maierhöfer suggests that a customary law *aut dedere aut judicare* rule has emerged with regard to war crimes committed in non-international armed conflicts.⁴⁷ His thorough analysis of extradition practice and domestic prosecutions provides evidence for the existence of an obligation to prosecute such violations on an equal footing with prosecuting grave breaches.⁴⁸ When it can be established that there is nowadays an *obligation* in customary international criminal law to prosecute war crimes committed in non-international armed conflicts, it is not hard to accept that previously, at the time of the crimes committed by the Afghan generals, there was a *right* under customary international criminal law to assert universal jurisdiction over such crimes. At this point we are reminded of the ICRC's study on customary international humanitarian law, in particular the commentary to Rule 157 that

The *right* of States to vest universal jurisdiction in their national courts over war crimes in no way diminishes the obligation of States party to the Geneva Conventions and States party to Additional Protocol I to provide for universal jurisdiction in their national legislation over those war crimes known as 'grave breaches'.⁴⁹

This leaves us to conclude that the defence argument with regard to universal jurisdiction can also be dismissed as untenable from an international law perspective.

5. CONCLUDING OBSERVATIONS

The Afghan cases constitute the second successful prosecution in the Netherlands on the basis of universal jurisdiction after the *Knežević* case. In 2004 the District Court of Rotterdam convicted and sentenced a former member of the Congolese Garde Civile for torture committed in what was then known as Zaire.⁵⁰ That case marked the first successful prosecution in the Netherlands on the basis of universal jurisdiction. What these three cases have in common is that they all ensue from an asylum procedure. They are the result of the transfer of files by the immigration authorities to the prosecution service.

47. See *supra* note 39.

48. Maierhöfer, *supra* note 39, at 196–221, where he refers to Danish, French, German, Dutch, Swiss, and Belgian practice.

49. J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), Vol. I (Rules), Rule 157, at 606 (emphasis added).

50. Rotterdam District Court, 7 April 2004, LJN: AO7178, available at <http://ljn.rechtspraak.nl>. See for a commentary W. N. Ferdinandusse, 'Prosecutor v. N.: Case No. AO7178', at <http://www.rechtspraak.nl>, translated at (2004) 51 *Netherlands International Law Review* 439, at 444; 'Rotterdam District Court, April 7, 2004, Prosecutor v. N.', (2005) 99 *AJIL* 686; M. Kamminga, 'First Conviction under the Universal Jurisdiction Provisions of the UN Convention against Torture: Rotterdam District Court', (2004) 51 *Netherlands International Law Review* 439.

Soon after the Afghan cases two more prosecutions for international crimes followed. This time it concerned Dutch nationals who, by doing business with the regimes of Saddam Hussein and Charles Taylor, were prosecuted for complicity in international crimes.⁵¹ These cases are illustrative of a more 'proactive' approach in investigating international crimes. Dutch police announced that sources other than immigration files – for instance non-governmental organization (NGO) reports and intelligence provided by the national security service (AIVD) – would be looked into and used as 'start-information' for building up a case.⁵² This might prevent any more *nemo tenetur* challenges in the future. Other problems, however, remain. For instance, the search for evidence of crimes that have been committed sometimes more than 20 years ago. Recently an Afghan asylum seeker was acquitted of charges of war crimes since there was no (reliable) evidence linking him to the torture of civilians.⁵³ This decision illustrates the complications of prosecuting international crimes. In exercising his or her prosecutorial discretion, the prosecutor will have to make sure that the evidentiary threshold for starting prosecutions in cases that go back 15 to 20 years is met.⁵⁴ It is, therefore, not to be expected that in the future Dutch courts will be overwhelmed with cases like the Afghan cases.

Having said that, an interesting development has recently taken place that may bring more international crimes cases to domestic courts in The Hague after all. On 13 April 2007 an ICTR trial chamber in *Prosecutor v. Michel Bagaragaza* ordered the case to be referred to the authorities of the Netherlands.⁵⁵ The Dutch Minister of Justice, in a 'note verbale' dated 11 December 2006, expressed his willingness to take over the *Bagaragaza* case. Not long before that, in a letter dated 3 November 2006, the Dutch government was requested by the ICTR prosecutor to accept transfer of yet another case. These developments illustrate that in implementing the ICTR's 'Completion Strategy',⁵⁶ requiring all first-instance cases to be completed by 2010, the ICTR prosecutor is actively pursuing a policy of referring cases to Dutch courts. A recent decision by a Dutch court may have put a halt to, or at least have delayed, this anticipated transfer of proceedings.

On 24 July 2007 the District Court in The Hague held that Dutch courts have no jurisdiction – universal jurisdiction on the basis of the representation principle – over

51. Frans van A. was sentenced to 15 years' imprisonment for complicity in war crimes (The Hague District Court, 23 December 2005, LJN: AU 8685 and The Hague Court of Appeal, 9 May 2007, LJN: BA6734 (English translation), all available at <http://ljn.rechtspraak.nl>). For a commentary see H. G. van der Wilt, 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the *van Anraat* Case', (2006) 4 *Journal of International Criminal Justice* 239. Guus van K. was sentenced to eight years for violating an international embargo (arms trade) and acquitted of war crimes (The Hague District Court, 7 June 2006, LJN AX 7098, available at <http://ljn.rechtspraak.nl>).

52. 'Evaluatie Plan van Aanpak', *supra* note 13, at 63.

53. The Hague District Court, 25 June 2006, LJN: BA7877, available at <http://ljn.rechtspraak.nl>.

54. See the policy document of the Public Prosecution Office stipulating that there is evidence that warrants a sufficient and realistic perspective for a successful prosecution within a reasonable time: 'Aanwijzing afdoening aangiften m.b.t. de strafbaarstellingen in de Wet internationale misdrijven', *supra* note 13, at 11, paras. 3.1.1–3.1.3.

55. *Prosecutor v. Bagaragaza*, Decision on Prosecutor's request for referral of the indictment to the Kingdom of the Netherlands, Case No. ICTR 2005–86–11 bis, T.Ch.III, 13 April 2007.

56. Adopted pursuant to deadlines set by the UN Security Council in Resolutions 1503 (2003) and 1534 (2004).

crimes committed by a Rwandan national in Rwanda in 1994.⁵⁷ In a well-motivated and carefully drafted decision the Court held that the transfer of proceedings from the ICTR to the Netherlands requires either a specific treaty provision or a specific statutory basis. The decision may be welcomed for doing justice to the 'closed' nature of the Dutch jurisdictional system of Dutch law – as already appeared from *Bouterse*⁵⁸ – and by recognizing the distinction in Dutch law between a co-operation regime on the basis of a general treaty provision (UN Charter taken together with the ICTY and ICTR Statutes) and a co-operation regime that requires a more specific basis. The former applies to surrender of the accused and the transfer of evidence *to* the Tribunal, the latter applies to the execution of Tribunal sentences and would also apply to the transfer of proceedings *from* the Tribunal. While the reasoning of the court is persuasive in systemizing and rationalizing the Dutch jurisdictional and co-operation scheme, it does, however, beg the question why the legislature never bothered to provide for a specific basis for transfer of proceedings⁵⁹ when the Dutch minister of justice seems to be more than keen to take over some of the ICTR's workload.

International criminal law is a fast developing field of law. Much has changed since John Dugard issued his Opinion in the *Bouterse* case. The Suriname authorities are currently preparing the trial of Bouterse in Suriname, before a military court. More than ever states are made aware of their responsibilities in ending impunity. John Dugard has played, and will continue to play, an important role in raising such awareness and we thank him for that.

57. The Hague District Court, 24 July 2007, LJN: BBo494 available at <http://ljn.rechtspraak.nl>.

58. See paras. 4.1–4.8 of the Dutch Supreme Court decision in *Bouterse*, and paras. 16, 17, and 69 of Advocate-General Keijzer, *supra* note 3.

59. After all, referral is regulated in Rule 11 *bis* of the ICTR Rules of Procedure and Evidence (RPE), providing for 'referral states' to take over a case. A similar provision can be found in the ICTY RPE.